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NO. 94-824

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PETER A. CROSBY,

Petitioner,

v.

STATE OF HAWAII, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

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Petitioner Peter Crosby submits his Reply Brief in Support of his Petition for Writ of Certiorari to the Supreme Court of the State of Hawaii.

I. THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED AND THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL

This petition for writ of certiorari was timely filed within ninety days of the entry of judgment by the Hawaii Supreme Court. Supreme Court Rule 13.4. Respondents wrongfully contend that this Court lacks jurisdiction over this appeal because the Petition was allegedly not timely filed. Respondents' Brief in Opposition at 4-5. In making this argument, Respondents have misled this Court by failing to research (and cite) two cases which resolve this issue: Puget Sound Company v. King County, 264 U.S. 22 (1923) and McCarthy v. Jaress, 6 Hawaii Appeals 143, 711 P.2d 1315 (1985).

In Puget Sound Company, respondents contended that petitioners had not filed their appeal from the Washington

Supreme Court within the time allowed by law. 264 U.S. at 23. The Washington Supreme Court entered its opinion on June 12, 1922 and filed its judgment on July 10, 1922. Petitioners filed their petition for writ of certiorari on September 22, 1922, within the ninety-day period for filing a writ starting on July 10, 1922, but beyond the ninety-day period for filing a writ starting on June 12, 1922. Id. at 24.

This Court rejected respondents' suggestion that petition was untimely filed on the basis that

> Under the law of Washington . . . a decision of a department of the Supreme Court does not become final until thirty days after it is filed, during which a petition for rehearing may be filed . . . [I]n all cases where the decision is final, there is a specific provision that a judgment shall issue thereon. It is apparent that however final the decision may be, it is not the judgment.

Id. at 24 (emphasis added).

The critical question for this Court is thus whether the opinion of the Hawaii Supreme Court or its subsequently entered judgment "is the judicial determination or sentence of

the court upon a matter within its jurisdiction." United States v. Hark, 320 U.S. 531, 554 (1943). This issue has been resolved by the Hawaii courts in McCarthy v. Jaress, 6 Hawaii Appeals 143, 711 P.2d 1315 (1985).

In McCarthy, appellees contended that appellate jurisdiction was terminated upon the filing of the appellate court's opinion. 6 Hawaii Appeals at 146, 711 P.2d at 1318. The Hawaii Intermediate Court of Appeals rejected that argument and ruled that under Hawaii Rules of Appellate Procedure 36 and 41, the appellate court's jurisdiction over the merits of the case terminates upon the filing of the appellate court's judgment and not its opinion. Id. at 146, 711 P.2d at 1318.

The Intermediate Court of Appeals went on to place the jurisdictional question raised by Respondents squarely within the rule set out in Puget Sound Company. Under the Hawaii Rules of Civil Procedure, the filing of the opinion is the starting date used to file a motion for reconsideration (similar

to the petition for rehearing under the Washington statute cited in Puget Sound Company). A motion for reconsideration cannot be filed after the Hawaii appellate court's judgment is filed. "In other words, the judgment is the final act with respect to the merits of the case on appeal." Id. at 146 n.5, 711 P.2d at 1318 n.5 (emphasis added). This unequivocal pronouncement of the Hawaii courts clearly refutes Respondents' contention that the judgment under Hawaii appellate practice is merely a ministerial task. Respondents' Brief in Opposition at 5.

As shown above, the petition for writ of certiorari was timely filed and this Court has jurisdiction to hear this appeal.

II. PETITIONER DID NOT OBSTRUCT OR DISRUPT GOVERNMENT OPERATIONS

Respondents next argued that Peter Crosby's conduct as distinguished from his speech should not be protected because it was obstructive and disruptive of government operations. Respondents' Brief in opposition at 5-6. All of Crosby's

"conduct" was expressive of his spoken and written beliefs that the project was being let illegally and was burdened with conflicts of interest. Specifically, Crosby declined the invitation by Goda to personally select the firms that would receive the Request for Proposal (Finding of Fact 25, Appendix B at 10), and he would not on his own volition insert language in the contract which stated: "Whereas, the services to be provided . . . do not admit of competition" (Finding of Fact 51, Appendix B at 23). The whole record shows that no orders were ever disobeyed by Crosby, and that his speech and conduct were motivated solely by his attempts to uphold the law.

In contrast to Respondents' unsubstantiated allegations, the trial court's Findings of Fact state that not only was Mr. Crosby's conduct not disruptive, it was his obligation to raise the concerns that he did. Specifically, Findings of Fact 71 and 65 state that:

> 71. Crosby's manner of stating his concerns to his superiors was not disruptive to the operations of the Department of Budget and Finance.
>
> ***
>
> 65. Up to April 18, 1989, the State of Hawaii, through its designated representative, could not identify any delays whatsoever that Crosby caused to the project. **The State of Hawaii, through its designated representative, testified that it was Crosby's obligation to raise his concerns concerning the method of selecting the contractor and apparent conflicts of interest with his supervisors.** From the time period July 1988 -- April 18, 1989, Crosby was never informed, in writing or otherwise, that his actions were delaying the project.

Petitioner's Appendix B at 31, 29 (Finding of Facts 71, Finding of Fact 65) (emphasis added).

The State's unsubstantiated factual allegations highlight that Peter Crosby was placed in the path of an illegal action taken by his superiors and that he acted reasonably in attempting to comply with his legal obligations in a process that was effectively fraudulent. Respondents' arguments ignore that Mr. Crosby was specifically acting within the law in attempting to obtain a written opinion of the Attorney General,

which may only be requested by the governor, the legislature, or its members, or by the head of a State department under Hawaii law. Hawaii Revised Statute § 28-3. Trial Exhibit 8: November 16, 1988 memorandum from Peter Crosby to Dennis Goda. [1]

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[1] Incredibly, the State argues that Peter Crosby might be entitled to constitutional protection if he was more disruptive and had gone "to the newspapers [or] given television interviews," Respondents' Brief in Opposition at 6. However, private speech is entitled to just as much protection as public speech:

> We are unable to agree that private expression of one's views is beyond constitutional protection, and therefore reverse the Court of Appeals' judgment and remand the case so that it may consider the contentions of the parties freed from this erroneous view of the First Amendment.
>
> This Court's decisions in *Pickering*, *Perry* and *Mt. Healthy* do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly. While those cases each arose in the context of a public employee's public expression, the rule to be derived from them is not dependent on that largely

III. MT. HEALTHY REQUIRES THE STATE TO MEET ITS BURDEN TO SHOW THAT IT WOULD HAVE REMOVED CROSBY FROM THE PROJECT ABSENT HIS PROTECTED SPEECH

Respondents next argue that under applicable case law, the State does not bear the burden to show that it would have taken the same action even in the absence of Crosby's protected speech. Respondents' Brief in Opposition at 6-7. However, Respondents' unfounded legal contentions totally ignore this Court's pronouncements in Mt. Healthy v. Doyle, 429 U.S. 274 (1977). Mt. Healthy specifically provides that:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" -- or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have

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coincidental fact.

Givhan v. Western Line Consolidated School District, 439 U.S. 410, 413-414 (1978).

> reached the same decision as to respondent's re-employment even in the absence of the protected conduct. [footnotes omitted]

429 U.S. at 287. Respondents simply are wrong on the applicable legal standards which the Hawaii Supreme Court should have applied to this case.

IV. EVEN THE "MINIMAL" BURDEN OF REMOVAL FROM THE PROJECT IS AN ADVERSE DISCIPLINARY ACTION WHICH IS PROTECTED UNDER THE FIRST AMENDMENT

Respondents next argue that because Mr. Crosby was merely removed from the project as opposed to being fired, the State did not engage in conduct which is prohibited by the First Amendment. Respondents' Brief in Opposition at 7. The State's position that

> Not a single decision of this Court either holds or suggests that a mere task reassignment constitutes sufficient 'burden' on First Amendment rights.

is duplicitous. Respondents' Brief in Opposition at 7. Numerous cases have held that it is the act of retaliation, in any context, that imposes the chilling effect on a public

employee's First Amendment rights. These cases have shown that any sanction imposed, even a sanction short of dismissal, is violative of the First Amendment and that First Amendment protection is proper. As this Court recognized in NAACP v. Button, 371 U.S. 415, 433 (1962):

> The threat of sanctions may deter [First Amendment freedoms] almost as potently as the actual application of sanctions.

See also, Rankin v. McPherson, 483 U.S. 378, 384 (1986) and Pickering v. Board of Education, 391 U.S. 563, 574 (1967).

Numerous lower courts have relied on these decisions to verify that actions short of dismissal and where there is no loss of monetary benefits may not be taken to impose a chilling effect on a person's right to free speech. E.g., Columbus Education Association v. Columbus City School District, 623 F.2d 1155, 1159-60 (6th Cir. 1980) (letter of reprimand placed in personnel file has chilling effect); Allaire v. Rodgers, 658 F.2d 1055, 1058 Note 2 (5th Cir. 1981) (listing cases which hold that alteration of employment conditions short of

termination in retaliation for protected speech is not permissible); Knapp v. Whitaker, 757 F.2d 827, 843 (7th Cir. 1985) (negative evaluation in teacher's personnel file expunged); Bernasconi v. Tempe Elementary School District No. 3, 548 F.2d 857 (9th Cir. 1977) (unwanted transfer constitutes loss of a valuable government benefit); Bart v. Telford, 677 F.2d 622 (7th Cir. 1982) (campaign of harassment for exercising First Amendment rights constitutes chilling effect); Piver v. Pender County Board of Education, 835 F.2d 1076 (4th Cir. 1987) (threat to transfer is chill on protected speech); Zamboni v. Standler, 847 F.2d 73 (3rd Cir. 1988) ("any action" in retaliation for protected speech could include de facto demotion when transferred, suspension without pay or other minor actions); Anderson v. Central Point School District, 746 F.2d 505, 508 (9th Cir. 1984) (loss of salary not necessary as element of damage for First Amendment violation); and Levin v. Harleston, 966 F.2d 85 (2nd Cir.

1992) (chilling effect on speech by creation of investigation committee and "shadow" section of philosophy course).

V. THE STATE'S ACTIONS IN INVESTIGATING CROSBY'S PERFORMANCE WERE NOT REASONABLE

Respondents last argue that Takushi's actions were reasonable under this Court's recent decision in Waters v. Churchill, 114 S.C. 1878 (1994). The Hawaii Supreme Court, however, never looked into the reasonableness of how Takushi formed his beliefs since,

> As indicated previously, the facts are not disputed in the instant case, so we need not decide whether the State's investigation met the Waters plurality's 'reasonableness test'.

Crosby v. State, 76 Hawaii 332, 341, n. 12, 876 P.2d 1300, 1309, n. 12 (1994), Appendix A at 27.

Nonetheless, the whole record clearly shows that there was no reasonable investigation by Takushi after he was informed by Erickson on April 11, 1989, of Crosby's concerns. For example, Takushi testified he had not seen Crosby's memoranda to Goda relating to the contractor

selection process and to the conflicts of interest until these were shown to him at his deposition. T. 12/5/90, 115-4 through 116-13. Further, Takushi was not aware that Erickson had possession of the draft contract for over one month, and that there was a one-month delay by the Director's office in selecting the project consultant. T 12/5/90, 148-4 through 148-15. Also, Takushi never spoke directly with Peter Crosby before discharging him from the project. Findings of Fact 77 and 78; T 12/4/90, 45-9 through 45-15; T. 12/5/90, 19-19 through 19-25; 20-5 through 20-8.

Takushi instead relied upon a conversation that he had with Crosby that was three years old and which did not relate to the tourism project as the basis for his belief that there was "bad blood" between Goda and Crosby. Finding of Fact 64; T. 12/5/90, 142-1 through 143-2. Similarly, there is no basis in the State's contention that Takushi "reasonably gained the impression that Crosby was responsible for blocking, delaying, and otherwise 'bogging down' the award of the contract."

Respondents' Brief in Opposition at 6. In fact, the trial court found just the opposite:

> 65. Up to April 18, 1989, the State of Hawaii; through its representative, could not identify any delays whatsoever that Crosby caused to the project . . . "

Petitioner's Appendix B at 29 (Finding of Fact 65). [2] Clearly, there was no reasonable investigation by the State in this case.

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[2] As further evidence of the State's total lack of understanding and investigation into its own actions, the State changed its position five days before the trial relating to whether the project should have been competitively bid or not. In Exhibit 1, the State responded that "the project does lend itself to competition." Defendant State of Hawaii's Answers to Plaintiff's First Request for Answers to Interrogatories to Defendant State of Hawaii, Interrogatory No. 3. On the eve of trial (apparently knowing it could not justify its position), the State amended its interrogatory responses and contended that the project "does not lend itself to competition." Exhibit E: State of Hawaii's Amended Response to Plaintiff's First Request for Answers to Interrogatories, Interrogatory No. 3.

VI. CONCLUSION

In conclusion, for the reasons set forth above and in Plaintiff's Petition for Writ of Certiorari, the Petition should be granted.

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